**DPM of Kansas, Inc.** *and* **United Food & Commercial Workers International Union, AFL–CIO–CLC, District Local 340.** Case 17–CA–10542

April 19, 1982

## DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on August 10, 1981, by United Food & Commercial Workers International Union, AFL–CIO–CLC, District Local 340, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint on September 14, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 30, 1980, following a Board election in Case 17–RC–8751[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about January 5, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so; and that, since on or about March 2, 1981, Respondent has failed and refused to supply information requested by the Union regarding the current names and addresses of unit employees which is necessary for collective bargaining. On September 28, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 18, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 22, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause, entitled "Resistance to Order Transferring Proceeding to the Board and Notice to Show Cause." Respondent also filed a Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

### Ruling on Motions for Summary Judgment

In its answer to the complaint, Respondent admits certain factual allegations of the complaint, but denies that it committed the unfair labor practices alleged.[2] Respondent, in its response to the Board's Notice To Show Cause, in substance attacks the Union's certification on the basis that it was deprived of due process of law as a result of the Board's failure to afford it a hearing on objections filed by the Union following a first representation election, and on its own objections to a second election directed by the Board. Respondent in its Motion for Summary Judgment asserts that there are no issues of fact which substantiate the General Counsel's position that it has a duty to

[1] Official notice is taken of the record in the representation proceeding, Case 17–RC–8751, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Respondent's answer asserts that it is without sufficient knowledge to answer the complaint's allegations that the Union has requested bargaining, that Respondent has failed and refused to bargain, and that Respondent has also failed and refused to furnish the Union with certain requested information which is needed for collective bargaining. We find no merit to these assertions. Counsel for the General Counsel attached to her Motion for Summary Judgment copies of letters, the authenticity of which Respondent does not challenge, establishing the Union's bargaining and information requests and Respondent's receipt thereof. Accordingly, we reject Respondent's argument in its response to the Notice To Show Cause that its answer raises material issues of fact rendering summary judgment inappropriate.

As to Respondent's argument that, under Sec. 102.20 of our Rules, its statement that it is without sufficient knowledge to admit or deny that it has refused to bargain constitutes a denial raising a material issue of fact. Respondent may not, without explanation, validly deny knowledge of its own actions and thereby create an artificial issue of fact simply in order to obtain a hearing when none is otherwise warranted. The provision of Sec. 102.20, to which Respondent adverts, states, in relevant part: "The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial." That provision is, however, qualified by Sec. 102.21 to the extent that an answer may be stricken if it is a sham and false, in which event the action may proceed as though the answer had not been served. Thus, under our Rules, a respondent must either admit, deny, or explain all allegations within its knowledge. Here, any complaint allegation as to Respondent's own conduct must be within its knowledge. Therefore, we cannot accept Respondent's claim that it is without sufficient knowledge to admit or deny that it has failed and refused to recognize and bargain with the Union, or that it has failed and refused to furnish the information sought by the Union. Accordingly, we hereby strike Respondent's answer that it is without sufficient knowledge to answer those complaint allegations. Since the allegations stand undenied, they are deemed admitted. Respondent's answer, therefore, raises no factual issues requiring a hearing for resolution.

bargain with the Union, and therefore that the Board should dismiss the complaint and remand the case to the Regional Director for a hearing on the objections with regard to both prior elections. Counsel for the General Counsel, on the other hand, argues that there are no litigable matters warranting a hearing because the issues concerning the Union's certification were litigated and determined in the underlying representation case. We agree with the General Counsel.

A review of the record, including that of the representation proceeding, Case 17-RC-8751, indicates that the Union lost an election conducted on June 15, 1979, pursuant to a Stipulation for Certification Upon Consent Election. The Union thereafter filed timely objections to conduct affecting the results of the election, alleging, *inter alia*, that the Employer (Respondent herein) called a meeting of employees on June 5, 1979, and announced a nonscheduled wage increase, and that the Employer granted an employee prorated vacation which had been refused prior to union activity. After investigation, during which both parties were afforded the opportunity to present evidence, the Regional Director issued, on July 27, 1979, his Report on Objections, in which he concluded that Respondent's announcement of two new benefits within the last 11 days before the election was an obvious departure from its proclaimed plan of sequentially announcing a series of improvements in benefits every 6 to 8 weeks,[3] and recommended that the election be set aside and a second election directed.

Respondent thereafter filed exceptions to the Regional Director's report, in which it asserted that certain of the Regional Director's findings and conclusions were contrary to the evidence and to controlling Board precedent. Respondent further excepted to the Regional Director's failure to conduct a hearing with respect to the Union's objections. On October 11, 1979, the Board, after reviewing the record in the light of Respondent's exceptions, issued a Decision in which it adopted the Regional Director's findings and recommendations and directed a second election.

A second election, which the Union won, was held on June 27, 1980. Respondent thereafter filed timely objections to conduct affecting the results of the election, alleging that the Union engaged in objectionable conduct by issuing a notice containing a substantial mischaracterization of Board processes and documents, and by misrepresentations made by the Union's representative to which Respondent did not have an opportunity to respond. Respondent further claimed that the Regional Office's failure to list the correct name of the Employer on the election notice resulted in a substantial portion of the work force not voting.[4] Respondent subsequently filed a supplemental objection, in which it urged that the Board's failure to certify the results of the first representation election, and its direction of a rerun election without affording Respondent a hearing on the Union's objections were arbitrary and capricious actions. Respondent requested therein that the Board sustain its supplemental objection and direct another rerun election.

Following investigation, in which both parties were again afforded the opportunity to present evidence, the Regional Director on August 7, 1980, issued a Supplemental Decision on Objections and Certification of Representative, in which he overruled all Respondent's objections and certified the Union. Respondent thereafter filed exceptions to the Regional Director's Supplemental Decision and Certification of Representative, along with a brief, affidavits, and other supporting documents. Respondent also filed a motion entitled "Motion To Revoke Certification and Remand Proceedings to the Regional Director for Appropriate Action pursuant to the Rules," urging that the Regional Director's issuance of a Supplemental Decision and Certification of Representative rather than a supplemental report was contrary to the Board's Rules.

On December 30, 1980, the Board, after reviewing the record in the light of Respondent's exceptions and brief, adopted the Regional Director's findings and recommendations and certified the Union. The Board noted in that Decision that the Regional Director's error in issuing a Supplemental Decision rather than a Supplemental Report was inadvertent and resulted in no prejudice to Respondent. The Board treated the document issued by the Regional Director as a Supplemental Report, and denied Respondent's motion.

It would thus appear that Respondent in the instant proceeding is attempting to litigate matters which were or could have been heard and determined in the representation proceeding. Specifically, with respect to the hearing contention, it is well established that parties do not have an absolute right to be a hearing. It is only when the moving

[3] Contrary to Respondent's assertions in its response to the Notice To Show Cause, the Regional Director based this conclusion not upon his credibility determinations with respect to union witnesses, but rather upon the fact that the Employer actually announced two separate new benefits within the last 11 days before the election in spite of its claim in its position letter that it had as early as February decided upon and committed itself to a program of announcing to employees a series of improvements in benefits *every 6 to 8 weeks*.

[4] The Regional Director found that sometime prior to June 1980, the precise date being unknown since Respondent's attorney would not allow the Board investigator to interview Respondent's representatives and obtain direct evidence as to the date, Respondent changed its name from "Sunflower Beef, Inc." to "DPM of Kansas, Inc."

party presents a *prima facie* showing of "substantial and material issues" which would warrant setting aside the election that it is entitled to an evidentiary hearing.[5] Here, Respondent submitted its evidence in support of its objections as exhibits to its exceptions to the Regional Director's Supplemental Decision on Objections and Certification of Representative, reasserting therein its contentions raised in its exceptions to the Regional Director's report and recommendations after the first election as well, and the Board concluded that they were insufficient to warrant the holding of a hearing. The Board instead adopted the Regional Director's findings and recommendations, and certified the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment. Respondent's Motion for Summary Judgment is hereby denied.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, a Kansas corporation, is engaged in the processing and nonretail sale of meat at a facility located at 800 East 37th Street North, Wichita, Kansas. Respondent, in the course and conduct of its business operations within the State of Kansas, annually sells goods and services valued in excess of $50,000, directly to customers located outside the State of Kansas.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

United Food & Commercial Workers International Union, AFL–CIO–CLC, District Local 340, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. *The Representation Proceeding*

##### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees including shipping and receiving employees, and janitorial employees employed by Sunflower Beef, Inc., also known as DPM of Kansas, Inc., at its facility located at 800 E. 37th Street North, Witchita, Kansas, but excluding professional and technical employees, truck drivers, office clerical employees, guards and supervisors as defined in the Act.

##### 2. The certification

On June 27, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 17, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on December 30, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

#### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 5, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 5, 1981, and continuing at all times thereafter to date, Respondent as refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

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[5] *Reichart Furniture Co.* v. *N.L.R.B.*, 649 F.2d 397 (6th Cir. 1981); *Revco D.S., Inc.* v. *N.L.R.B.*, 653 F.2d 264 (6th Cir. 1981); *Modine Manufacturing Co*, 500 F.2d 914 (8th Cir. 1974).

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Further, the Union has requested that Respondent supply it with information regarding the current names and addresses of unit employees, which information is necessary for collective bargaining. Commencing on or about March 2, 1981, and at all times material thereafter, Respondent has failed or refused to supply the requested information.

Accordingly, we find that Respondent has, since January 5, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, including, since March 2, 1981, refusing to supply certain pertinent information requested by the Union, and that, by such refusals, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, supply the requested information and bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

### CONCLUSIONS OF LAW

1. DPM of Kansas, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers International Union, AFL-CIO-CLC, District Local 340, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including shipping and receiving employees, and janitorial employees employed by Sunflower Beef, Inc., also known as DPM of Kansas, Inc., at its facility located at 800 E. 37th Street North, Wichita, Kansas, but excluding professional and technical employees, truck drivers, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 30, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 5, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing since on or about March 2, 1981, to supply information requested by the Union regarding the current names and addresses of unit employees, which information is necessary for collective bargaining, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

DPM of Kansas, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food & Commercial Workers International Union, AFL–CIO–CLC, District Local 340, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees including shipping and receiving employees, and janitorial employees employed by Sunflower Beef, Inc., also known as DPM of Kansas, Inc., at its facility located at 800 E. 37th Street North, Wichita, Kansas, but excluding professional and technical employees, truck drivers, office clerical employees, guards and supervisors as defined in the Act.

(b) Refusing to supply the aforesaid labor organization with information necessary for collective bargaining, including the current names and addresses of unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, supply the above-named labor organization with information necessary for collective bargaining, including the current names and addresses of unit employees.

(c) Post at its facility at 800 E. 37th Street North, Wichita, Kansas, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with United Food & Commercial Workers International Union, AFL–CIO–CLC, District Local 340, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply the above-named Union with information necessary for collective bargaining, including the current names and addresses of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees including shipping and receiving employees, and janitorial employees employed by Sunflower Beef, Inc., also known as DPM of Kansas, Inc., at its facility located at 800 E. 37th Street North, Wichita, Kansas, but excluding professional and technical employees, truck drivers, office clerical employees, guards and supervisors as defined in the Act.

DPM OF KANSAS, INC.